DATE: February 7, 1994
CASE NO. 92-ERA-14

IN THE MATTER OF

JAMES DEBOSE,

COMPLAINANT,

v.

CAROLINA POWER AND LIGHT COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER DISAPPROVING SETTLEMENT
AND REMANDING CASE

The Administrative Law Judge (ALJ) submitted an Order Recommending Disapproval of Proposed Settlement Agreement (ALJ order) on February 27, 1992, in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). The parties filed with the Secretary a Joint Motion to Approve Settlement Agreement on March 3, 1992, in which they stated they did not intend to file briefs, and the Director of the Office of Administrative Appeals issued a notice on March 9, 1992 that no briefing schedule would be established in this case. In addition, Complainant's counsel wrote to the Secretary on March 3, 1992 setting forth the reasons why the Secretary should approve the settlement.

The ALJ recommended disapproval of the settlement because it contains several provisions providing for confidentiality of the terms of the agreement, including a provision that the agreement itself be placed in a "restricted access" portion of the record

under 29 C.F.R. § 18.56 (1991). The ALJ found that these confidentiality provisions would violate several policies underlying the ERA and the Secretary's functions under the Act. ALJ order at 2-3.

The starting point for any consideration of public

disclosure of government records [1] is the Freedom of Information Act (FOIA). 5 U.S.C. § 552 (1988). Prior to passage of the FOIA, agencies had general authority to regulate dissemination of documents under 5 U.S.C. § 301 (1988), the general housekeeping statute, and section 3 of the original Administrative Procedure Act. Those two statutes had come to be used by agencies as justification for generally withholding information from the public. "Under the old APA, Section 3, agency and department heads enjoyed a 'sort of personal ownership of news about their units,' and a wide ranging discretion to suppress information . . . ." *Getman v. NLRB*, 450 F.2d 670, 678-79 (D.C. Cir. 1971). The FOIA was enacted to reverse the general policy of agencies to deny access to government records. It established "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). When the FOIA was amended in 1974, Congress reiterated that the exemptions are "the outer limits of information that *may* be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate - as well as that the exemption relied upon allows - that the information *should* be withheld." S. Rep. No. 584, 93d Cong., 2d Sess., 6 (1974).

It is clear, moreover, that the exemptions in the FOIA are "exclusive," *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973), because the FOIA itself states that it "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in [the Act]." 5 U.S.C. § 552(c). The exemptions are to be narrowly construed, and agencies cannot expand the exemptions through broad regulations. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). If documents do not fall within an exemption, agencies may not justify withholding on the grounds that disclosure "would do more harm than good," *Wellman Indus., Inc. v. NLRB*, 490 F. 2d 427, 429 (4th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974), or that the disclosed documents could be misinterpreted, *Getman v. NLRB*, 450 F.2d 670, 680 (D.C. Cir. 1971).

A situation analogous to that presented here arose in *County of Madison v. U.S. Dep't of Justice*, 641 F.2d 1036 (1st Cir. 1981). There, Madison County made an FOIA request for letters from the Department of Justice to the Oneida Tribe discussing the

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settlement of litigation against the United States by the Tribe. The Department of Justice denied the FOIA request, relying on the b(5) exemption, and the general policy that settlements are to be encouraged and confidentiality of settlement discussions will foster settlements. The court rejected these arguments, holding that no matter how compelling the policy arguments are, the agency still had to show that the documents fell under one of the exemptions. [2] The court explained:

> [t]he FOIA's legislative history 'emphasize[d]' that the law 'is not a withholding statute but a disclosure statute . . . .' [cite om.] The purpose of the [FOIA]

> was to 'eliminate' vague statutory phrases that agencies had previously used as 'loopholes' for withholding information and 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . .' [cite om.] [U]certainties in the FOIA's language are to be construed in favor of disclosure and . . . its exemptions are to be read narrowly . . . . [T]he government suggests no principled manner in which to confine FOIA's scope, should it persuade us to hurdle the limiting statutory language."

641 F.2d 1040.

It is clear, therefore, in light of the FOIA, its legislative history, and the cases discussed above, that the settlement in this case must be made available upon request for public inspection and copying, unless it falls under an exemption in the FOIA. Only if it falls under an exemption (and disclosure is not prohibited by law, such as 18 U.S.C. § 1905 (1988)) may the Department of Labor consider the factors urged by Complainant's counsel in favor of approval of the settlement, such as the need of the requesting party for access to the settlement balanced against the parties' interests in confidentiality.

Furthermore, it would not be appropriate, in the absence of an FOIA request, to determine now whether any exemption is applicable. If such a request is received for this particular document in the future, a new determination of the applicability of the exemptions would have to be made, in light of the passage of time and changed circumstances. In addition, if an FOIA request is denied by the agency component having custody of the record, the requesting party has the right to appeal to the Solicitor of Labor. 29 C.F.R. § 70.22. That right of appeal would have little meaning if the Department of Labor commmitted itself in advance not to disclose the settlement. No assurances of confidentiality can be given in advance of an FOIA request

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because an agency "promise of confidentiality [cannot] in and of itself defeat the right of disclosure." *Petkas v. Staats*, 501 F.2d 887, 889 (D.C. Cir. 1974); *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1287 (D.C. Cir. 1983) (". . . agencies cannot alter the dictates of the [FOIA] by their own express or implied promises of confidentiality. . . ."). Approval of the settlement with its provisions on confidentiality would amount to providing such assurances.

I find, therefore, that I cannot approve the settlement agreement, regardless of whether its other provisions are fair, adequate and reasonable. *See Macktal v. Brown & Root, Inc.*, 923 F.2d 1150, 1154-56 (5th Cir. 1991) (Secretary may only approve or disapprove settlement but may not sever terms agreed to by parties).

The parties should be aware, however, that Department of Labor regulations implementing the FOIA provide that submitters of information may designate specific information as confidential commercial information to be handled as provided in those

regulations. 29 C.F.R. § 70.26(b) (1991). When an FOIA request for such information is received, the Department of Labor will notify the submitter promptly, 29 C.F.R. § 70.26(c), the submitter will be given a reasonable period of time to state its objections to disclosure, 29 C.F.R. § 70.26(e), and the submitter will be notified if a decision is made to disclose the information. 29 C.F.R. § 70.26(f). If the information is withheld and suit is filed by the requestor to compel disclosure, the submitter will be notified. 29 C.F.R. § 70.26(h). [3]

These regulations provide substantial protection for the interests of the parties in the confidentiality of the settlement. The parties are encouraged to reconsider the confidentiality provisions of the settlement in light of these regulations and to submit an amended settlement to the ALJ. However, for the reasons discussed above, the Joint Motion to Approve Settlement Agreement is denied, and this matter is remanded to the ALJ for further proceedings consistent with this order, the ERA and the regulations, 29 C.F.R. Part 24.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] There can be little doubt that the settlement here is part of the record in this case and therefore is a government record subject to the FOIA. *See Forsham v. Harris*, 445 U.S. 169, 182 (1980).

[2] The court held that the b(5) exemption did not apply because these letters were not "inter-agency or intra-agency memoranda."

[3] Some components of the Department of Labor have incorporated these regulations into their operations manuals. *See, e.g.*, OFCCP Compliance Manual, Chapter 5, section 5G04 (Dec. 17, 1991 revision.)